

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALLEN PECKHAM,
Plaintiff,

v.

JOSEPH LEHMAN,
Defendant.

Case No. C04-5720FDB

REPORT AND
RECOMMENDATION

**NOTED FOR:
JUNE 17th, 2005**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the court is defendant's motion to dismiss for failure to state a claim. The defendants argue this action is barred by a running of the statute of limitations. (Dkt. # 4).

A response was filed and plaintiff argues that the concepts of accrual, conspiracy, favorable termination, and equitable tolling should apply to this action. Three of the concepts accrual, conspiracy, or equitable tolling, could render the defendant's statute of limitations argument invalid. The fourth

1 concept, favorable termination, would result in dismissal without prejudice. (Dkt. # 14).

2 Defendants have replied and show that the concepts of accrual or conspiracy do not apply to
3 the facts of this case. (Dkt. # 18). While the defendants also argue favorable termination would
4 result in dismissal without prejudice the court disagrees that the concept is applicable to the facts of
5 this case. Review of the doctrine of equitable tolling convinces the court the doctrine is inapplicable
6 to the facts of this case. Accordingly the undersigned recommends that this action be **DISMISSED**
7 **AS TIME BARRED.**

8 FACTS

9 Plaintiff was an inmate. Plaintiff alleges he had an earned early release date of August 16th,
10 1997, (Dkt. # 15). Plaintiff was not released by the Department of Corrections until April 16th,
11 1999. When he was released from prison on April 16th, 1999, he was held for civil commitment
12 proceedings by parties who are not named defendants in this action.

13 This action was not filed until October 27th, 2004. (Dkt. # 1). Plaintiff filed this action
14 claiming the Secretary of the Department of Corrections is liable for holding him past his earned
15 early release date. (Dkt. # 1).

16 DISCUSSION

17 42 U.S.C. § 1983, the Civil Rights Act, contains no statute of limitations. The statute of
18 limitations from the state cause of action most like a civil rights act is used. Usually this is a states
19 personal injury statute. In Washington a plaintiff has three years to file an action. Rose v. Rinaldi,
20 654 F.2d 546 (9th Cir 1981). Plaintiff was first aware he was being held past his earned early release
21 date on August 16th, 1997 when he was not released. He could not file a civil rights action at that
22 time as he would have been challenging fact or duration of confinement. Heck v. Humphrey, 512
23 U.S. 477 (1994). The alleged violation was ongoing until April 16th, 1999 when he was released.
24 This was when his alleged injury manifest as plaintiff could file an action claiming damages for
25 allegedly holding him past his release date. Plaintiff had until April 16th, 2002 to file an action. This
26 action was commenced on October 27th, 2004 when plaintiff paid the filing fee and submitted the
27 complaint. (Dkt. # 1). The statue of limitation had run nearly 30 months earlier.

1 A court may dismiss a claim under Fed.R.Civ.P. 12(b)(6) if it appears beyond doubt that the
2 plaintiff can prove no set of facts to support the claim that would entitle the plaintiff to relief.
3 Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983), citing; Conley v. Gibson, 355 U.S. 41,
4 45-56 (1957). Dismissal for failure to state a claim may be based on either the lack of a cognizable
5 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v.
6 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as
7 admitted and the complaint is construed in the plaintiff's favor. Keniston v. Roberts, 717 F.2d 1295
8 (9th Cir. 1983). However, a plaintiff must plead factual allegations with specificity; vague and
9 conclusory allegations fail to state a claim for relief. Colburn v. Upper Darby Township, 838 F.2d
10 663, 666 (3rd Cir. 1988).

11 Plaintiff argues his case of action did not accrue until the state court declared the holding of a
12 similarly situated person was improper. (Dkt. # 30, page 2)(citing In re Dutcher, 114 Wn. App 755
13 (2002)). This argument is without merit. A decision in Dutcher is not an element of plaintiff's case.
14 The Dutcher decision represents a legal decision that Mr. Dutcher's continued incarceration was
15 improper. The holding was not a factual element of plaintiff case, it was a legal determination that
16 the facts stated a viable claim. The discovery rule as argued by plaintiff is not applicable to the facts
17 of this action.

18 Plaintiff next argues conspiracy but he has not named the proper defendants for that claim.
19 Plaintiff has not named any of the persons responsible for his civil commitment in this action.
20 Further, he has presented no evidence showing bad faith. Del Guzzi Constr. Co. v. Global
21 Northwest Ltd., 105 Wn.2d 878, 885, 719 P.2d 120 (1986); Millay v. Cam, 135 Wn.2d 193, 206,
22 955 P. 2d 791. (1998).

23 Plaintiff argues he is entitled to equitable tolling but fails to show any action by the state that
24 prevented him from filing an action earlier. Thus, the doctrine of equitable tolling does not appear
25 applicable to this case. Plaintiff knew all the facts needed to file this action and was able to file on
26 September 16th, 1998. He failed to file within the three year time period. Accordingly, this action is
27 time barred and should be **DISMISSED WITH PREJUDICE**.

1 Finally, plaintiff argues his case should be dismissed without prejudice so that he can
2 challenge the validity his current civil commitment. Heck v. Humphrey, 512 U.S. 477 (1994).
3 Plaintiff's reliance on Heck v. Humphrey is misplaced. The holding of Heck precludes a plaintiff
4 from challenging a current conviction or confinement in a civil rights action as the proper forum for
5 an action that calls into question the propriety of current confinement is a habeas corpus action.

6 The time for plaintiff filing a habeas action that challenges his release date on a prior
7 conviction has elapsed. As of April 16th, 1999 plaintiff was not in custody. A habeas filing
8 challenging his prior conviction would be inappropriate.

9 The propriety of his current confinement at the Special Commitment Center is not an issue
10 before this court. This action seeks damages for failing to release plaintiff from the Department of
11 Corrections on his early release date. Plaintiff did not seek release from his current confinement or a
12 ruling that the civil commitment proceedings were invalid. Accordingly, this action is time barred
13 and should be **DISMISSED WITH PREJUDICE**.

14 CONCLUSION

15 For the reasons outlined above the undersigned recommends **DISMISSAL WITH**
16 **PREJUDICE**. A proposed order accompanies this Report and Recommendation.

17 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
18 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R.
19 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.
20 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is
21 directed to set the matter for consideration on **June 17th, 2005**, as noted in the caption.

22 DATED this 13th day of May, 2005.

23
24 /S/ J. Kelley Arnold
25 J. Kelley Arnold
26 United States Magistrate Judge
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